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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DENISE APOCADA,

Plaintiff and Appellant,

v.

JUDICIAL COUNCIL OF
CALIFORNIA,

Defendant and Respondent.

B287828

(Los Angeles County
Super. Ct. No. BC648604)

APPEAL from an order of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Raymond Ghermezian and Raymond Ghermezian for Plaintiff and Appellant.

Hayes Law Office and Frederick B. Hayes for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Denise Apocada appeals from the trial court's order denying her petition for relief from the claim-filing requirements of the Government Claims Act (the Act). (Gov. Code, § 810 et seq.)¹ Plaintiff contends that the trial court abused its discretion in denying her petition because her failure to file a timely claim against the Judicial Council of California (the JCC) was the result of excusable neglect as defined by section 946.6, subdivision (c)(1). We affirm.

II. BACKGROUND

A. *The Act*

Personal injury suits against governmental entities are governed by the Act. No personal injury suit may be brought against a government entity until a formal claim has been presented to, and rejected by, the entity. (§ 945.4.) The claim must be presented within six months of the accrual of the cause of action. (§ 911.2, subd. (a).) When a plaintiff fails to file a claim within this prescribed period, he or she may apply to the government entity for permission to file a late claim. (§ 911.4, subd. (a); see also *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275 (*Bettencourt*).) Following the rejection of such an application, a plaintiff may petition the trial court for relief from the filing requirements of section 945.4. (§ 946.6, subd. (a).)

¹ Unless otherwise noted, all statutory references and citations are to the Government Code.

B. *Facts and Procedural History*

On August 24, 2016, plaintiff allegedly fell while on the premises of the Los Angeles County Superior Court in Long Beach, California (the premises). She retained counsel, who conducted a title search for the premises within two months of the accident. According to counsel's declaration, "[t]he title search showed the name of [JCC] located at 445 Golden Gate Avenue, San Francisco, CA." Counsel then entered the address of 445 Golden Gate Avenue, San Francisco, California, into the Google search engine, which directed counsel "to a list of websites, the first of which read 'San Francisco district office-CA.gov.'" Counsel clicked on that first link and was directed to a website that "showed State of California." Counsel called the telephone number listed on the website and spoke to an unidentified individual whom counsel described as a "clerk" (employee).² Counsel asked the employee whether state courthouses "were under the control of the State of California or some other entity." The employee responded that courthouses were controlled by the counties in which they were located.

Counsel then filed a formal claim pursuant to the Act against the County of Los Angeles. He also filed a claim against the State of California, "to be safe in case the information regarding the counties . . . was incorrect," as well as a claim against the City of Long Beach.

² There is no indication in the declaration filed by plaintiff's counsel that the person who answered the telephone identified herself as a clerk or as an employee of the JCC or any other entity. Counsel did not include in his declaration the telephone number that he called.

In July 2017, 11 months following the accident, counsel learned or realized that a claim should have been filed with the JCC.³ Plaintiff then filed an application to present a late claim against the JCC, pursuant to section 911.4, which the JCC denied.

On October 19, 2017, plaintiff filed a petition, pursuant to section 946.6, for an order relieving her from the claim filing requirements of section 945.4. In support of her petition, plaintiff contended that her counsel's failure to file a timely claim against the JCC constituted excusable neglect under the Act because, unlike the attorneys in several previous cases where relief was granted, he at least made some effort to investigate the matter, but reached the wrong conclusion. Plaintiff also contended that the JCC was estopped from challenging plaintiff's failure to file a timely claim.

The trial court denied relief, concluding that counsel's conduct did not constitute excusable neglect because he was aware that the information he received from the employee may have been incorrect, yet decided to forego filing a claim with the JCC, whom he knew held title to the premises.⁴

³ Counsel does not explain what he learned that made him realize this, or how he learned it.

⁴ Plaintiff argues on appeal that the trial court improperly considered the following contentions from the JCC: (1) that the telephone number that plaintiff's counsel called belonged to the Department of Industrial Relations of the State of California; (2) that the address at which the JCC is located is also home to offices of the State of California; and (3) that counsel "knew" that the JCC "was the appropriate entity." There is no indication, however, that the trial court considered any of these

III. DISCUSSION

A. *Applicable Law and Standard of Review*

To obtain relief under section 946.6, a plaintiff must show that one of the four requirements of subdivision (c) of that section is met. (§ 946.6, subd. (c); *Bettencourt, supra*, 42 Cal.3d at p. 275.) One such requirement is that the failure to present the claim on time was due to mistake, inadvertence, surprise, or excusable neglect. (§ 946.6, subd. (c)(1).) It is the burden of a plaintiff seeking relief from the claim-filing requirements to show excusable neglect. (See *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1783 [“a petitioner has the burden of proving . . . the necessary elements for relief”].)

We review a trial court’s grant or denial of relief under section 946.6 for an abuse of discretion. (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435 (*Ebersol*).) Section 946.6’s primary policy goal is to facilitate reaching a trial on the merits and “a trial court decision denying relief will be scrutinized more carefully than an order granting relief.” (*Bettencourt, supra*, 42 Cal.3d at p. 276.) Nevertheless, this policy consideration “cannot be applied indiscriminately so as to render ineffective the statutory time limits.” (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.)

The standard for excusable neglect under section 946.6 is the same as the standard for excusable neglect under California

contentions as evidence. Indeed, none of these purported “facts” was part of the court’s written order denying the petition. Nor did the trial court state during the hearing that it was relying on any such facts.

Code of Civil Procedure section 473, subdivision (b). (*Ebersol, supra*, 35 Cal.3d at p. 435; *Renteria v. Juvenile Justice, Department of Corrections & Rehabilitation* (2006) 135 Cal.App.4th 903, 911.) “[T]he discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).)

B. *The Trial Court Did Not Abuse its Discretion in Denying Relief*

Plaintiff contends that the trial court erred in denying her relief under section 946.6 because the errors committed by the lawyers in *Flores v. Board of Supervisors* (1970) 13 Cal.App.3d 480, *Bettencourt, supra*, 42 Cal.3d 270, *Kaslavage v. West Kern County Water Dist.* (1978) 84 Cal.App.3d 529, and *Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, were similar to or more “serious” than the errors committed by her counsel, yet the courts in those cases excused the lawyers’ neglect. We disagree based on the existence of at least two distinguishing facts in this case.

First, here, plaintiff’s counsel conducted a title search which revealed that JCC owned the property. While an owner who has “relinquished control of property to a tenant” is not necessarily liable for injuries sustained on the property (*Salinas*

v. Martin (2008) 166 Cal.App.4th 404, 412), plaintiff's counsel provides no explanation for why he did not file a claim against the title holder.

Second, plaintiff's counsel filed claims against both the State of California and the City of Long Beach "to be safe in case the information regarding the counties [provided by the employee] . . . was incorrect," demonstrating that counsel knowingly assessed the risks associated with relying on the employee's advice and made a strategic decision to file against those other public entities but not the JCC. This is not a "mistake that could have been made by anybody" (*Zamora, supra*, 28 Cal.4th at p. 259), but is the type of discretionary and strategic legal decision that courts have traditionally concluded is not excusable. (See, e.g., *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1414 [poor "strategic" and "tactical" decisions regarding how to carry out litigation are inexcusable]; *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 929 [holding counsel's "strategic and tactical" decision not to make certain responses to interrogatories part of the record inexcusable under Code Civ. Proc., § 473, subd. (b)].)

In our view, the facts of this case are more analogous to those in *Greene v. State of California* (1990) 222 Cal.App.3d 117 (*Greene*). In *Greene*, the plaintiff, who was injured in a traffic accident on a highway, failed to timely file a claim with the State of California. (*Id.* at p. 119.) The plaintiff argued that his late filing was excused, in part, because counsel's secretary had spoken to a person at the Orange County clerk's office, who stated that the accident occurred in Orange County and the plaintiff "needed to file a claim with the county." (*Ibid.*) The plaintiff characterized the clerk's statement as a representation

that Orange County owned the roadway on which plaintiff was injured. (*Id.* at p. 122.) The plaintiff's counsel, however, possessed a report prepared by a California Highway Patrol (CHP) officer who investigated the accident, which stated that the accident occurred on "SR-1 (Pacific Coast Highway) . . . 126[] feet north of Aliso Way." (*Id.* at p. 119.) Counsel also conducted a title search to determine who owned the property on which plaintiff was injured and "[t]he title insurer confirmed that the property was owned by a government entity, but could not state which one." (*Id.* at p. 120.) When the State of California did not grant the plaintiff's request to file a late claim, the plaintiff filed a petition pursuant to section 946.6. (*Id.* at p. 118.) The Court of Appeal affirmed the trial court's denial of the petition. (*Id.* at p. 123.)

The court in *Greene* noted that the accident report clearly reflected that the accident occurred on State Route 1, "and respondent's ownership and control of [the state highway] is established by statute." (*Greene, supra*, 222 Cal.App.3d at pp. 120, 121-122 [citing Sts. & Hy. Code, §§ 90-92, 233].) Moreover, even assuming that plaintiff had been incorrectly advised by the Orange County clerk that the roadway was owned by the county, "it is incredible counsel did not immediately file an application and claim with the state to protect her client's interests. Attorneys representing clients in personal injury matters routinely try to locate as many potential tortfeasors as possible to ensure his or her client receives adequate compensation. The CHP report reflected an accident occurring on a state highway. Thus, no basis existed for counsel's concern about filing a false claim." (*Id.* at p. 122.)

Similarly, here, the JCC's control over courthouses is codified by statute, specifically, the Trial Court Facilities Act of 2002, which provides that "[e]xcept as otherwise provided by this chapter, or by the agreement between the [JCC] and the county under this chapter, the [JCC] shall have ongoing responsibility for providing trial court facilities." (§ 70312.) Such responsibility was to be transferred from the counties of the state to the JCC no later than December 31, 2009. (§ 70321.) Thus it was established as a matter of law that the JCC had controlled state courthouses for at least six years prior to plaintiff's accident. Although there is no evidence that plaintiff's counsel was aware of this statute and the codification of a public entity's control over premises is not dispositive on the issue of excusable neglect, the existence of the Trial Court Facilities Act of 2002 weighs against finding counsel's conduct here to be excusable, particularly when plaintiff's counsel had actual knowledge that the JCC held title to the premises. Thus, the trial court did not abuse its discretion in denying plaintiff relief. (See also *Spencer v. Merced County Office of Education* (1997) 59 Cal.App.4th 1429, 1438-1440 [§ 946.6 relief denied where attorney possessed a letter indicating that the Merced County Office of Education was the correct defendant, but incorrectly assumed that this entity was a component of the County of Merced, and failed to consult a "readily accessible" public source, namely, a public roster of government entities in California maintained by the Secretary of State and county clerks].)

C. *Plaintiff Has Not Established Equitable Estoppel*

Plaintiff next contends that the trial court erred in denying her petition because the JCC is estopped from asserting that her claim is time barred. We disagree.

A government entity “may be estopped from asserting noncompliance with the statutory claim filing requirements where a claimant has been misled by [the] entity’s agents with respect to the . . . requirements of the claim statutes.” (*Toscano v. County of Los Angeles* (1979) 92 Cal.App.3d 775, 784.) In order to obtain relief under section 946.6 by estoppel, a plaintiff must establish by a preponderance of the evidence that the public entity did something upon which the movant relied to his or her detriment or injury. (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 (*City of Goleta*).) The plaintiff must also show that reliance on the public entity’s action or statement was reasonable. (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261 (*Schafer*).) When a party seeks to apply equitable estoppel against a government entity, a court must additionally determine that the estoppel is necessary to avoid “grave injustice” and that its application will not defeat an important public policy. (*City of Goleta, supra*, 40 Cal.4th at p. 279.)

Where the facts are in dispute, equitable estoppel is typically a pure question of fact and is reviewed on appeal under the substantial evidence standard. (*Schafer, supra*, 237 Cal.App.4th at p. 1263.) However, whether a government entity is estopped is a mixed question of fact and law because of the policy and injustice factors. (*Id.* at pp. 1263-1264.) We review a

question of law de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801.)

Here, plaintiff could not demonstrate that the JCC was responsible for any of plaintiff's counsel's mistakes. As we discussed above, although counsel in his declaration summarily referred to the employee as a "clerk," there is no evidence that the employee with whom counsel spoke was employed by or associated with the JCC. Nor is there any indication that the employee identified herself as such. Moreover, plaintiff could not demonstrate that she relied to her detriment on the employee's statement since plaintiff's counsel filed claims against the State of California and the City of Long Beach, "to be safe." Finally, for the same reasons that plaintiff's failure to timely file a claim against the JCC was not excusable, we conclude that even if plaintiff's counsel had relied on the employee's statement—and he did not—it would have been unreasonable under the circumstances to do so.

IV. DISPOSITION

The order denying plaintiff's petition for relief from the Act's claim filing requirements is affirmed. The JCC shall recover costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.